No. 80-1353

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

VAN DYK RESEARCH CORPORATION,
*Petitioner,*

v.

XEROX CORPORATION,
*Respondent.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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March 13, 1981

## QUESTION PRESENTED

Did the Court of Appeals for the Third Circuit make a "very obvious and exceptional" error in affirming the detailed factual findings of the trial court, sitting without a jury, that the petitioner, Van Dyk Research Corporation, had not been injured in its financing or marketing efforts by either the marketing practices or the patent holdings of the Xerox Corporation, which petitioner alleged were in violation of the antitrust laws?*

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* Pursuant to Supreme Court Rule 28.1, Xerox, a New York corporation, states that it has no parent or affiliates. Xerox has one United States subsidiary which is not wholly owned—Rank Xerox Business Equipment, Inc., a Delaware corporation. Xerox also has other subsidiaries, as defined by the Securities and Exchange Commission, in a number of foreign countries: Xerox do Brasil, S.A.; Xerox de Mexico, S.A. de C.V.; Xerox del Peru, S.A.; Xerox de Venezuela, C.A.; Xerox de Colombia, S.A.; Rank Xerox Limited; Rank Xerox Holding B.V.; Rank Xerox Manufacturing (Nederland) B.V.; Rank Xerox Fabrikations G.m.b.H.; Societe Industrielle Rank Xerox S.A.; Fuji Xerox Co., Ltd.; Office de Transformation Papetiere S.A.; Rank Xerox Espanola S.A.; Rank Xerox (N.Z.) Ltd.; and Rank Xerox (Australia) Pty. Ltd.

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## RESPONDENT'S BRIEF IN OPPOSITION

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The respondent, Xerox Corporation ("Xerox"), respectfully requests that this Court deny the petition for certiorari filed by Van Dyk Research Corporation ("Van Dyk") which seeks review of the decision by the United States Court of Appeals for the Third Circuit affirming the factual findings in this case of the United States District Court for the District of New Jersey. The opinion of the court of appeals is reported at 631 F.2d 251; the findings and decision of the trial court are reported at 478 F. Supp. 1268.

## STATEMENT OF THE CASE

In this action, Van Dyk sought to obtain treble damages from Xerox on the theory that it was injured by Xerox' alleged violation of the antitrust laws. After a lengthy bench trial, the

district court found in favor of Xerox on each of the critical factual issues in the case. The trial court found that Van Dyk had failed to show (i) that Xerox possessed monopoly power in a relevant market, (ii) that Xerox willfully acquired or maintained its position by any exclusionary conduct, (iii) that Van Dyk was injured as a result of any conduct by Xerox, or (iv) that Van Dyk's estimate of damages was anything other than speculative.

The trial court's judgment in favor of Xerox was affirmed by a unanimous panel of the court of appeals. Focusing on whether Xerox' allegedly unlawful conduct had injured Van Dyk, the court of appeals affirmed the trial court's detailed findings that Xerox' practices had not been the cause of Van Dyk's financial difficulties. Since this conclusion was dispositive of the appeal, the Third Circuit declined to discuss Van Dyk's other contentions. Van Dyk now challenges the decisions below, asking this Court to reexamine the voluminous trial record and to conclude that both the trial court and the court of appeals were guilty of "very obvious and exceptional error" in finding that Van Dyk had failed to meet its burden of proof on the dispositive issue of "fact of damage."

As found by both the trial court and the court of appeals, the pertinent facts of this dispute span more than 30 years. In 1946 Xerox was a small, struggling business named the Haloid Company ("Haloid") when its president became interested in an experimental process now known as "xerography". (FF 4-6; Pet. App. 3a.)[1] Haloid was willing to assume the risk of commercial development of the process even though it was "sufficiently remote as to make impossible a reasonable estimate as to [the] cost required." (FF 14-15; A. 4975-76.)

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[1] In this response, "FF" refers to the trial court's findings of fact as reported at 478 F. Supp. 1268 and reprinted at pages 19a-118a of the Appendix to Van Dyk's petition; "Pet. App." refers to the decision of the court of appeals as reported at 631 F.2d 251 and reprinted at pages 1a-15a of the Appendix to Van Dyk's petition; "A" refers to the appendix consisting of the trial record which was lodged with the court of appeals.

By 1950 Haloid had managed to develop a machine which operated on xerographic principles. That machine, however, was slow, unautomated, and could not be marketed as a copier. (FF 23; A. 1337-38, 1463, 1742-43, 1747-50.) It required an additional decade of research and development before Haloid was able to attain its objective of a feasible, automated general purpose copier. From 1954 through 1960, Haloid spent more than its total profits in its attempt to develop such a marketable copier. (A. 1464, 1465-66.) C. Peter McColough, now Xerox' chairman, described this as a "sort of bet-your-company-all-or-nothing project . . . ." (A. 1468-69.)

This research effort spawned numerous inventions. Each of the inventions solved some technical problem, and the company obtained patents on them to protect against their appropriation by others. (FF 216, 217; A. 1400, 1763a-64, 1871-72, 2041, 2117-20.) As the trial court found after examining numerous documents and hearing the testimony of six witnesses directly responsible for Xerox' patent efforts, "Xerox' patents [came] into existence through the need to solve technical problems inherent in the improvement of its products and the development of new products . . . ." (FF 216.)

By the late 1950's, Xerox' development efforts began to pay off. In 1958, the company produced prototypes of an automated, general purpose copier—the Model 914—and a smaller desk-top copier—the Model 813. Xerox showed both of these models to IBM, in the hopes of interesting it in their manufacture and marketing. (FF 37; A. 1469-75.) To the dismay of Xerox' management, IBM rejected the proposal. (FF 40; Pet. App. 3a; A. 1418-19, 1486-87.) IBM had been informed by its consultant, Arthur D. Little, Inc., that the 914 had "no future in the office-copying-equipment market" and that the 813 "probably [was] not a good business risk . . . ." (A. 5180, 5180b.)

Xerox nevertheless decided to go it alone. It introduced the Model 914 in 1960 and the desk-top Model 813 in 1963. (FF 87; A. 1537.) These were followed by a succession of

improved models characterized by progressively higher copying speeds and by such special features as the ability to make reduced copies and t copy on both sides of a piece of paper. (FF 53, 55; A. 1511, 1578-81, 1610, 1614-19.) This continuing research and development effort was costly both in terms of time and money. For example, the introduction of Xerox' highly sophisticated Model 9200 in 1974, a machine which produced copies at the rate of 120 copies per minute, was the result of seven years of research and development which cost Xerox approximately $300 million. (FF 55; A. 1667-76.)[2]

During this period of rapid Xerox product development, Xerox' competitors did not remain idle. As the trial court found, they developed new and improved products of their own including:

> (a) coated paper machines which produced copies on paper virtually indistinguishable from plain paper;
>
> (b) offset devices which were designed to compete with xerographic plain paper copier/duplicators in the office environment;[3] and
>
> (c) competing plain paper copier/duplicator from IBM, Kodak and a host of Japanese manufacturers. (FF 123-47, 174-77.)

This was the highly competitive and rapidly changing market that Van Dyk entered in 1973 with its Van Dyk 4000—a copier/duplicator which Van Dyk's founder, Dr. Maxwell Pollack, for the most part had faithfully patterned after Xerox' Model 3600, a machine Xerox had introduced four years

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[2] The figures quoted by Van Dyk in its petition concerning the "assigned cost" of various Xerox machines omit these huge research and development costs. Not surprisingly, the sales prices set by Xerox to recover part of those R&D costs are much higher.

[3] At one point in its petition, Van Dyk exclaims that: "Even Xerox conceded that it did not compete significantly with offset presses." (Pet. at 17.) This, of course, is not true. Xerox has consistently urged, as found by the trial court, that it competed intensively with manufacturers of offset copier/duplicators and that such equipment was properly part of the relevant market. (FF 121-122, 136-144, 174-179, 189-190.)

earlier.[4] (FF 53, 63; Pet. App. 5a; A. 1129-37, 2402-05, 2410-51.) As described below, far from being excluded from the market, Van Dyk successfully raised nearly $6 million through public offerings in 1969 and 1972 to develop and commence production of the 4000. (FF 59, 61; Pet. App. 5a; A. 1029-33, 1039.)

A number of business machine companies were interested in financing and marketing the Van Dyk 4000. Indeed, in early 1973, Apeco Corporation, a manufacturer of coated paper copiers and other office equipment, agreed to merge with Van Dyk. (FF 66; Pet. App. 5a-6a; A. 1042-43, 1071, 1089-92, 1167-68, 3089-90, 3101.) Since Apeco was to market the Van Dyk machines, Van Dyk abandoned its own efforts to develop a marketing organization and instead concentrated on expanding its manufacturing program. Apeco advanced Van Dyk $5 million for that purpose. That loan, together with another $3 million line of credit, was more than sufficient to finance Van Dyk's expansion. (FF 65, 67; A. 708-10, 1166-68, 1185-86.)

Unfortunately for Van Dyk, the Apeco merger subsequently collapsed when Apeco defaulted on certain of its loan agreements. (FF 68; Pet. App. 6a; A. 1175-77.) As a result, Van Dyk, which had geared up its production in anticipation of the merger, found itself with "machines that were coming off the production line," but with no cash to pay its suppliers, no direct sales force, and virtually no dealer organization to market its machines. Nevertheless, Van Dyk decided that there was "no turning back" and embarked on "a rush program to provide for the distribution of the machines." (FF 69; A. 708-10, 1047, 1185-86, 1194-96.)

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[4] As the district court found, the Van Dyk 4000 "xerographic engine" was virtually identical to that of the Xerox 3600. (FF 63.) On the other hand, the Van Dyk 4000 lacked many of the features that customers demand such as reduction, automatic document handling, two-sided copying, and the ability to copy on sheets of paper rather than a roll. (FF 63, 112, 367-70.) By the time Van Dyk introduced its Model 4000, Xerox and other competitors such as IBM and Kodak were already working on a new generation of machines—most notably, Xerox' sophisticated Model 9200—which were far faster and had all of the features Van Dyk's machine lacked.

In December 1973, Van Dyk reached an agreement with SCM Corporation under which SCM would purchase 2200 Van Dyk machines to market under SCM's trademark. (FF 71; Pet. App. 6a; A. 3134-85.) The SCM agreement, however, was cancellable by SCM at any time. (FF 71; A. 3161-62, 3169-85.) In January 1975, SCM terminated the contract, again leaving Van Dyk with machines pouring off its production line but with no channels of distribution. (FF 73, 76; Pet. App. 6a; A. 1203, 1221-23.) Again, Van Dyk was committed to pay its parts suppliers but had failed to develop a sufficient cash flow to do so. (FF 76; Pet. App. 6a-7a; A. 714-15.)

In late 1973 Van Dyk explored the possibility of another public offering to raise funds for its expansion. That effort, however, was frustrated when the SEC began an investigation of Van Dyk's underwriter, Mayflower Securities. (FF 70; Pet. App. 6a.) In the straitened financial market of 1974, Van Dyk unsuccessfully tried to raise $10 million in a private placement. (FF 77; A. 1052, 1279-80, 2726, 2729, 2750-51.) And in the still-tight money market of 1975, Van Dyk, now suffering from the effects of the SCM contract termination, was again unsuccessful in raising new capital to finance its over-extended operations. (FF 79; A. 1228, 2726, 2729, 2753-54.) Unable to pay its suppliers, Van Dyk filed a petition for an arrangement under Chapter XI of the Bankruptcy Act and lawsuits against Apeco, SCM, and Xerox.

Following extensive pretrial discovery, this case was tried before the Honorable Frederick B. Lacey, sitting without a jury. The trial, which consumed 24 trial days, involved the testimony of 39 witnesses and more than 1400 exhibits. On August 20, 1979, the trial court issued a 98-page opinion—over 88 pages of which were devoted to detailed findings of fact—and entered judgment in favor of Xerox.

In rejecting Van Dyk's allegations that Xerox had violated the antitrust laws, the trial court found that:

> "Xerox' success in the field of copying/duplicating was attributable to its position as a pioneer in developing the xerographic process; to its intensive research and development efforts in xerography; to the

> lawful patent protection which it was able to obtain for its inventions in xerography; to its ability to develop lawful innovative pricing and marketing methods for its products; and to its continuing willingness to take risks in developing and marketing new xerographic technology." (FF 56.) [5]

The trial court further found that, assuming *arguendo* that Xerox had engaged in the conduct alleged by Van Dyk and that that conduct violated the antitrust laws, Van Dyk had simply not been injured by Xerox' practices. Specifically, the trial court rejected Van Dyk's contention that its financing and marketing efforts had been frustrated by Xerox' patent position and rental policies. (FF 78, 320-24.) To the contrary, the trial court found that Van Dyk's financial difficulties were the result of its own failure to coordinate its manufacturing and marketing capabilities during a national economic recession. (FF 69-79.)

The court of appeals limited its decision to the trial court's findings that Van Dyk had not been injured by any conduct of Xerox. Like the trial court, the court of appeals concluded that Van Dyk had failed to establish any causal connection between Xerox' allegedly unlawful practices and Van Dyk's financial difficulties. The court of appeals affirmed the trial court's

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[5] Although Van Dyk rests its petition for certiorari primarily on its contention that the courts below were wrong in finding that Xerox' patent position did not injure Van Dyk, Van Dyk also asserts that the trial court committed "clear error" in its independent findings that Xerox did not possess monopoly power in any relevant market and that Xerox' practice of renting its machines on a month-to-month basis was not unlawful.

The record, however, amply demonstrates the validity of the trial court's findings that the relevant copier/duplicator market includes coated paper and offset machines as well as the plain paper copiers manufactured by Xerox and Van Dyk (FF 81-93, 102-122, 131-145, 151-169, 174-176, 185-193); and that Xerox had no ability to exclude competition from, or control prices in, that market (FF 190-193).

The record also supports the trial court's findings that, contrary to Van Dyk's charge that Xerox rented its machines on a short-term basis for anticompetitive purposes, Xerox' rental policies were a response to the demands of its customers. (FF 313-316.) The record further establishes that Van Dyk chose to rent rather than sell its machines for its own business reasons, including its desire to have "faster market penetration" and "continuing income in years to come." (FF 322.)

findings that Van Dyk was the victim of its own management decisions and the recession of 1974-75:

> "It is to be expected, even in the absence of antitrust violations, that every fledgling enterprise will experience difficulties in entering a market against well established and knowledgeable competitors, and Van Dyk had more than its share. The disastrous failure of the Apeco merger, the SEC investigation that disabled Mayflower [Van Dyk's underwriter], and the cancellation of the SCM contract, all occurring during a period of tight money, were simply more than Van Dyk could endure . . . .
>
> "We conclude that Van Dyk failed to establish a right to recovery, and, accordingly, the judgment of the district court will be affirmed." (Pet. App. 11a-12a.)

Van Dyk's petition for rehearing *en banc* was denied without further comment. (Pet. App. 129a.)

## REASONS FOR DENYING THE WRIT

Van Dyk's petition does not raise any legal issue. Rather, Van Dyk merely challenges the factual findings of the trial court, affirmed by a unanimous court of appeals, that, even if Xerox' patent and rental practices violated the antitrust laws, Van Dyk was not injured by Xerox' actions. Van Dyk thus reargues the facts to this Court in the same way it unsuccessfully reargued the facts to the court of appeals. It presents this Court with an amalgam of facts torn from context, material outside the record, and allegations devoid of any support whatsoever.

In attempting to impeach the factual findings of the trial court, Van Dyk disregards the basic principle of appellate review that *de novo* factfinding cannot properly take place at the appellate level. *SmithKline Corp.* v. *Eli Lilly & Co.*, 575 F.2d 1056, 1064 (3rd Cir.), *cert. denied*, 439 U.S. 838 (1978). More importantly, Van Dyk has ignored this Court's "repeated

pronouncements" that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Berenyi* v. *District Director,* 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275 (1949). *Accord, Branti* v. *Finkel,* 445 U.S. 507, 512 n.6 (1980).

That "seasoned and wise rule" has "particular force" in a case such as this where the "resolution of disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court . . . ." *Comstock* v. *Group of Institutional Investors,* 335 U.S. 211, 213-14 (1948); *Berenyi, supra,* 385 U.S. at 636. In this case, the trial court heard 39 witnesses over 24 trial days and reviewed a record of more than 7000 pages of testimony and 1400 exhibits. Following its own thorough review of that voluminous record, the unanimous panel of the court of appeals affirmed the trial court's detailed findings that Van Dyk had not been injured by any conduct of Xerox.

As we shall now demonstrate, Van Dyk has not made the "very obvious and exceptional showing of error" required to justify any further review by this Court of those decisive factual findings. Indeed, Van Dyk has not shown any error at all.

## I. THE DISTRICT COURT AND COURT OF APPEALS APPLIED THE PROPER LEGAL STANDARD IN CONCLUDING THAT VAN DYK HAD FAILED TO PROVE THAT XEROX' ALLEGEDLY UNLAWFUL CONDUCT WAS A "MATERIAL CAUSE" OF INJURY TO VAN DYK.

In its petition, Van Dyk baldly asserts that the decision of the court of appeals below "effectively nullifies the fact of damage standard enunciated by this Court in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U. S. 100 (1969) . . . ." Van Dyk, however, omits the fact that the court of appeals began its legal analysis by citing that very standard:

> "The plaintiff has the burden of proving that the established illegality was a material cause of the

injury. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969)." (Pet. App. 8a.)

Van Dyk does not cite any authority indicating that the Third Circuit erroneously applied the "material cause" standard announced in *Zenith*. It is, in fact, clear that the Third Circuit's decision that Van Dyk was obligated to demonstrate that Xerox' allegedly unlawful conduct was a "material" and "substantial" cause of Van Dyk's financial difficulties was in accord with the decisions of every other court of appeals after *Zenith*. *See, e.g., Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Reibert* v. *Atlantic Richfield Co.*, 471 F.2d 727, 731 (10th Cir. 1972), *cert. denied*, 411 U.S. 938 (1973); *H&B Equipment Co., Inc.* v. *International Harvester Co.*, 577 F.2d 239, 246 (5th Cir. 1978).

Van Dyk simply refuses to recognize that, as this Court held in *Zenith*, a private antitrust plaintiff cannot leap from an alleged antitrust violation to the calculation of treble damages. Rather, the private plaintiff must first prove that it was directly and materially injured by the allegedly unlawful conduct: "Failure to prove that it was injured 'by reason of' the defendants' alleged antitrust violations is of course sufficient to defeat [the plaintiff's] claims." *Hudson Valley Asbestos Corp.* v. *Tougher Heating & Plumbing Co.*, 510 F.2d 1140, 1142 (2d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

The Third Circuit's affirmance of the trial court's detailed findings that Van Dyk was not injured by any conduct of Xerox was thus dispositive of Van Dyk's claims. As a matter of judicial economy, there was no need for the court of appeals to review the other issues in the case once it had determined that Van Dyk had failed to meet its burden of proof on the critical question of impact.[6] Accordingly, there is no merit whatsoever

[6] *H&B Equipment Co., supra*, 577 F.2d at 246 (since plaintiff "failed to satisfy crucial elements of proof concerning causation and damages," it was not necessary for the court to address the legality of the alleged antitrust violations); *Reibert, supra*, 471 F.2d at 729 (since the finding that plaintiff was not injured was "dispositive," the court need not consider the legality of the alleged antitrust violations).

in Van Dyk's supposition, based solely on an unsupported comment in an investment house newsletter (Pet. at 25 n.20), that the court of appeals limited its review to the absence of any proof of "impact" because it agreed with Van Dyk on the issues of market definition, alleged monopolistic practices, the amount of alleged damage, and the other factual questions resolved in each and every instance by the trial court against Van Dyk.

In a last-ditch effort to inject some pretense of a legal issue into its petition, Van Dyk argues to this Court—as it argued to the court of appeals—that certain decisions by first-level examiners of the United States Patent and Trademark Office rendered after the trial court's decision demonstrate that the trial court was "misled" in deciding the patent issues in this case. Van Dyk further contends that the trial court's allegedly erroneous factual findings on those patent issues "undoubtedly influenced its view of all other issues" (Pet. at 11), and thus require a remand for reconsideration of Van Dyk's damage claims. This argument was properly rejected by the court of appeals both on the initial appeal and on Van Dyk's request for rehearing *en banc*.

The preliminary decisions in question arose in the context of a patent infringement suit filed by Xerox against SCM in which SCM filed a third-party complaint against Van Dyk, the supplier of the allegedly infringing copier/duplicators. Both SCM and Van Dyk asserted, as is typical in such cases, that the nine patents at issue were "obvious" in light of the prior art. The trial court in the patent case stayed its proceedings until the Patent and Trademark Office could make an assessment of this claim pursuant to that office's reissue procedures. 37 C.F.R. §1.171 *et seq.* On a preliminary basis, and subject to appeal to the Chief Examiners, the first-level examiners have now concluded that seven of the nine patents were "obvious" in light of prior art.

Even if Van Dyk were entitled to rely on matters of this type which were not before the trial court,[7] the preliminary findings on "obviousness" are hardly a vindication of Van Dyk's contention that Xerox misused its patents to foreclose competition. Contrary to Van Dyk's repeated misstatements, the issue before the patent examiners was the existence of prior art and not any failure by Xerox to disclose that prior art to the patent office. As the court of appeals was quick to point out, a determination of obviousness shows nothing about a patent applicant's good faith, and it certainly does not constitute a violation of the antitrust laws.[8] *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 179 (1965) (Harlan, J., concurring); *E.I. duPont de Nemours & Co.* v. *Berkley & Co.*, 620 F.2d 1247, 1273-75 (8th Cir. 1980).

Nor do the preliminary patent decisions support another argument Van Dyk advanced at trial—that Xerox had threatened a patent infringement action against Van Dyk in bad faith. In order to rebut that charge (and not as Van Dyk suggests as part of some wicked strategy to denigrate Van Dyk), Xerox presented evidence with respect to the patents in

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[7] It is in fact clear that under the controlling decisions of both this Court and the Third Circuit the preliminary decisions of the patent examiners cannot be considered for the first time on appeal. *See New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970); *In re Sugar Industry Antitrust Litigation.*, 579 F.2d 13, 19 (3d Cir. 1978); *United States ex rel. Bradshaw* v. *Allredge*, 432 F.2d 1248, 1250 (3d Cir. 1970).

[8] Van Dyk asserted before the court of appeals, as it asserts here, that the examiners' preliminary determination of obviousness with respect to some of Xerox' patents supports Van Dyk's theory that Xerox was involved in a bad faith effort to "repatent" inventions on which patents were expiring. But at oral argument before the court of appeals even Van Dyk's counsel was forced to admit the fallacy of that proposition:

> "THE COURT: And the Patent Office didn't find misuse of the patents, did they?
>
> "MR. LEVY: They found the prior art rendered them invalid.
>
> "THE COURT: All right. But that's not, of course, the same as misuse.
>
> "MR. LEVY: No, it is not the same." (Oral Argument Tr. 10.)

question as well as the xerographic features of the Van Dyk 4000. The trial court concluded that "based on [the court's] own viewing of the subject matter involved, including the nine patents and the Van Dyk equipment, . . . an infringement suit would not have been frivolous." (FF 231.)

Finally, and most importantly for present purposes, the preliminary patent office decisions that some of Xerox' patents were "obvious" have no effect on the findings of both courts below that Van Dyk simply was not injured by Xerox' patent position. (FF 78, 324.) It is Van Dyk's quarrel with those independent findings on the absence of any "fact of damage", and not the legal standards or decisional approach of the courts below, that is the nub of Van Dyk's petition to this Court.

## II. THE DISTRICT COURT AND COURT OF APPEALS CORRECTLY CONCLUDED THAT VAN DYK HAD NOT BEEN INJURED BY ANY CONDUCT OF XEROX.

As discussed above, absent a demonstration of some "very obvious and exceptional" error, this Court should not review the factual findings of the trial court, affirmed by the court of appeals, that Van Dyk was not injured by any conduct of Xerox. Van Dyk has not cited any such error, and hence the concurrent findings below should end the matter.

But should the Court choose to review those factual findings, it will find that Van Dyk's version of the facts, which it artfully but erroneously labels as "uncontradicted evidence" (Pet. at 19), ignores the full trial record. That record amply supports the trial court's findings that Van Dyk's financial difficulties were not the result of any actions by Xerox, but on the contrary were the outcome of Van Dyk's own business decisions and the economic recession which plagued the entire nation in 1974 and 1975.

The record establishes that, through the end of 1973, Van Dyk was able to secure more than sufficient financing despite Xerox' allegedly anticompetitive policies. In 1969 and 1972, Van Dyk raised nearly $6 million in two successful public

offerings despite the substantial disclaimers quoted at length in Van Dyk's petition concerning Xerox' patent position. (Pet. at 19 n.16.) Indeed, both of those offerings were oversubscribed. (FF 59, 62; A. 581-82, 610-11.)

In 1972, Van Dyk secured an additional $3 million line of credit from the American National Bank of Morristown (New Jersey)—a line of credit that it never used. (FF 65; Pet. App. 5a; A. 1156, 1170.) And in 1973, Van Dyk obtained a $5 million loan from Apeco, an established manufacturer of coated paper copiers.[9] (Pet. App. 6a; A. 1085, 1170, 1278, 6106.) As both the trial court and court of appeals found, Van Dyk secured all of this financing despite a full disclosure of Xerox' patent position and Van Dyk's announced intention to rent rather than sell its machines. (FF 58-62, 65-68; Pet. App. 5a; A. 1154, 3059-60, 3078.)[10]

In May 1973, Van Dyk and Apeco agreed to merge. (FF 66; Pet. App. 6a; A. 1042-43, 1047, 1174-75.) As the district court found, Apeco agreed to the merger with full knowledge of Xerox' patent position and Van Dyk's intention to rent its machines. (FF 66-67; A. 3119.) The proposed merger, however, collapsed in September 1973—not because of any conduct

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[9] Van Dyk's suggestion that its financing arrangements with Apeco were frustrated by the concern of one of Apeco's banks, Harris Trust, over Xerox' patent position ignores the fact that other banks provided Apeco with all of the funds Apeco requested. (A. 4749-50; 5948-50.)

[10] Van Dyk's ability to secure more than adequate financing is further demonstrated by the fact that, during the early 1970's, Van Dyk rejected a number of inquiries from other potential investors—such as A.B. Dick, Saxon, and GAF—which could have more than met Van Dyk's financing needs. (A. 6348, 6364, 6369.)

Unable to respond to these facts from the relevant period, Van Dyk reaches far back into its history to argue that an inquiry by GAF in 1966 concerning Xerox' patents demonstrates that Xerox' patent position prevented GAF and Van Dyk from coming to terms at that time. Van Dyk, however, fails to note that in 1966 Van Dyk did not even have a prototype copier to show GAF. And, of course, Van Dyk omits the fact that in 1971, the time at issue in this case, GAF made overtures to invest in Van Dyk—overtures that Van Dyk, which by then had more than ample financial backing, rejected. (A. 1243-44, 6348.)

by Xerox, but rather because Apeco had defaulted on a loan agreement with its banks. (FF 68; A. 1185-88.)[11]

In anticipation of the Apeco merger, Van Dyk had vastly increased its production of machines but had failed to develop its own marketing force. (FF 69; A. 681-82, 712, 1166-67, 1185-86, 1195-96.) The aborted merger thus left Van Dyk with a cash-flow problem. Rather than curtailing production or developing its own marketing staff, Van Dyk's management decided to distribute its machines through some other company. (FF 69; A. 1047, 1194-96.) In December 1973, Van Dyk reached an agreement with SCM which called for SCM's purchase of 2200 Van Dyk machines over the next two years. (FF 71; A. 1047, 1196-98, 1202-03, 3134-85.)

The SCM contract once again placed Van Dyk on a sound financial footing. Nevertheless, Van Dyk, wishing to expand even more rapidly, decided to seek further outside financing by privately placing $10 million in securities through Merrill Lynch. (A. 538.) By 1974, however, the nation was in the depths of its worst recession in 20 years. (A. 6317-37.) Van Dyk itself has acknowledged that any public offering it might

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[11] Van Dyk's suggestion in its petition that Xerox was somehow indirectly responsible for the failure of the Apeco merger is refuted by both the specific findings of the trial court and the testimony of Van Dyk's president, Dr. Pollack, who conceded that any such suggestion would be "speculation." (FF 68; A. 1172-73.)

There is similarly no merit in Van Dyk's conjecture that Xerox' patent position deterred another firm, Agfa-Gevaert, from investing in Van Dyk in 1973. To be sure, Agfa-Gevaert requested some information concerning Xerox' patents. But the last communication in the record, again omitted by Van Dyk, indicates that, after reviewing Xerox' patent position, Agfa-Gevaert continued to be "very much interested in long term cooperation" with Van Dyk and was "prepared to invest the necessary means which such a cooperation would imply." (A. 3089.) As Van Dyk conceded in a proposed finding to the district court, "The Apeco merger then intervened," and Van Dyk therefore lost any interest in a financial arrangement with Agfa-Gevaert. *Van Dyk's Proposed Findings of Fact* IX, F, 2.

have made in 1974 "would have been unsuccessful . . . due to the deteriorating condition of the securities market." (A. 6153.)[12]

In its brief, Van Dyk blithely ignores the trial record demonstrating the depressed condition of the money markets and other factors unrelated to Xerox which both the district court and court of appeals found were directly responsible for the failure of Van Dyk's 1974 offering. (FF 77; Pet. App. 6a.) Van Dyk also ignores the fact that it failed to call a single potential investor to testify to his reasons for not participating in the 1974 offering.

The most reliable evidence offered by Van Dyk concerning the failure of its 1974 private placement—the contemporaneous notes of the Merrill Lynch underwriter, Mr. Bennett, summarizing the comments of potential investors—demonstrates that the offering failed because of the depressed condition of the securities markets, Van Dyk's lack of management depth, Van Dyk's prior public offerings, and other factors which had nothing to do with Xerox. (A. 3083-85.) According to Mr. Bennett's notes, eleven of the 49 potential investors contacted stated that they were not accepting any private placements during the 1974 recession. Another eight indicated that they had decided not to purchase Van Dyk's securities because Van Dyk was "too far along" and "not venturesome enough"—references to the fact that Van Dyk had previously made public offerings and thus was unattractive for a private placement. Four more firms told Mr. Bennett that they had decided not to invest in Van Dyk because they felt its management was not sufficiently deep. Finally, eighteen other firms told Mr. Bennett that they had decided not to invest for various other reasons having nothing to do with Xerox. (A. 3083-85.)

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[12] Van Dyk's bleak assessment of the 1974 securities market was confirmed by the trial testimony of securities experts. (FF 77; A. 540, 2724-40.) It is, in fact, noteworthy that the Van Dyk offering was the *only* private placement that Merrill Lynch even attempted during 1974. (A. 542-43.) There is thus no merit in Van Dyk's assertion that it was unable to interest any major investment house in marketing its securities.

Indeed, what is most significant about Mr. Bennett's notes is the relative absence of references to Xerox. Although Mr. Bennett advised each of the 49 investors he contacted that Van Dyk would be in direct competition with Xerox, only seven made any mention of "Xerox" as even a partial reason for their decision not to invest. (A. 545, 3083-85.)

Moreover, the fact that seven of 49 potential investors may have mentioned "Xerox" as one reason for their decision not to invest proves nothing, for Van Dyk never attempted to show that any of those investors were concerned by anything more than the *lawful* competition of the leader in the industry. Thus, one of the firms which mentioned "Xerox" told Mr. Bennett that it had decided not to invest in Van Dyk because Xerox was "technologically too far ahead with the 9200," Xerox' new, highly sophisticated copier. (A. 3083.) This recognition of Xerox as a company with a superior product clearly cannot be the basis for any antitrust liability. *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 297 F.2d 906, 911 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962); *ILC Peripherals Leasing Corp.* v. *IBM Corp.*, 458 F. Supp. 423, 435-36 (N.D. Cal. 1978).

Mr. Bennett's contemporaneous notes are especially devastating to Van Dyk's speculation that it was denied adequate financing because investors were deterred by Xerox' short-term rentals or patent portfolio. Not one of the 49 firms contacted by Mr. Bennett referred to the fact that Van Dyk intended to rent its machines as Xerox had done. Similarly, only two of the 49 potential investors expressed any concern over Xerox' patent position, and those two did so as only one of a number of reasons for declining to invest. (A. 3083-85.)[13] Mr. Bennett's notes—together with the other evidence cited above—thus more than justify the findings of both courts below that Van Dyk's 1974 private placement was not frustrated in a "material" way by any conduct of Xerox. (FF 77-78; Pet. App. 6a.)

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[13] The United States Steel Pension Fund commented, "One man show; Xerox patents; reliance on SCM; cancellation possible; won't lead." The Ford Foundation stated, "Xerox too strong; IBM; Kodak; Xerox patents." (A. 3083-85.)

The courts below were also correct in rejecting Van Dyk's contention that its efforts to raise additional capital in 1975 failed because of Xerox. Again, the trial record fully supports the concurrent findings below that Van Dyk's difficulties were the direct result of its own refusal to balance its production and marketing activities during a national business recession. (FF 74-79; Pet. App. 7a.)

As noted above, in December 1973 SCM agreed to distribute 2200 Van Dyk machines over the next two years. (A. 3134-85.) Shortly thereafter, however, SCM asked Van Dyk to reduce the rate at which SCM was committed to distribute the machines. Van Dyk refused to curtail its production significantly. As a result, in January 1975 SCM cancelled the distribution agreement. (FF 74; A. 1203-05.) Van Dyk, which had still not developed its own marketing force, was thus again forced to seek outside financing for its over-extended operations.

Unfortunately for Van Dyk, the nation was still in the throes of the 1974-75 recession. Without the SCM contract to lend it credibility, Van Dyk now found itself in a highly unfavorable position. (FF 79; Pet. App. 7a.) Moreover, Van Dyk had made no arrangements to repay the $5 million loan from Apeco which was coming due in 1976. (FF 78; A. 518-19, 6232, 6248-49.) According to Van Dyk's own underwriters, the 1975 public offering—Van Dyk's principal financing effort—failed because of the poor condition of the financial markets. (FF 79; A. 1228.)

In sum, given the tight money markets of 1974-1975, the collapse of both the Apeco and SCM arrangements, Van Dyk's thin management, its lack of a marketing organization, the obsolescent nature of its product, and competition not only from Xerox but also from IBM, Kodak and a host of other manufacturers, it is little wonder that Van Dyk failed to obtain financing for its over-extended operations. As both the trial court and court of appeals concluded, the record simply does not support Van Dyk's speculation that its attempts to raise additional capital in 1974 and 1975 were frustrated by any conduct of Xerox.

## CONCLUSION

Van Dyk has not come close to making the requisite showing of "very obvious and exceptional error" to justify any further review by this Court of the concurrent and dispositive factual findings of the courts below. Accordingly, Van Dyk's petition for certiorari should be denied.

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